United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-1360

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In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

THOMAS ZAMMAS,

Defendant-Appellant.

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC BY THOMAS ZAMMAS, AND MOTION IN THE ALTERNATIVE FOR A STAY OF MANDATE AND FIXATION OF BAIL FOR APPELLANT PENDING CERTIORARI

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TO THE HONORABLE CIRCUIT JUDGES TIMBERS, VAN GRAAFEILAND and NESKILL:

The Defendant-Appellant, Thomas Zammas, respectfully petitions this Court pursuant to its rules and prays this Court grant a rehearing in connection with the order and opinion of this Court rendered the 9th day of January, 1976 affirming the judgment of the United States District Court for the Southern District of New York which convicted Thomas Zammas of violating 18 U.S.C. 1341, 18 U.S.C. 2, and 15 U.S.C. 77 q (b) (the anti-touting statute) after trial before Motley, D.J. and a jury.

In the event that this bench denies a rehearing or the present determination is adhered to, then Appellant respectfully requests that this Petition be submitted to all of the active

Circuit Judges for a determination en banc.

The importance of the issues herein involved transcend this particular case since they are vital questions concerning the substantial due process of rights of Defendant Zammas.

BRIEF STATEMENT OF THE UNDERLYING FACTS

After the Preliminary proceedings were concluded, Stanley Perlmutter commenced his testimony. Perlmutter was a registered representative at Continental Securities in the year 1972. Mr. Perlmutter had met the defendant, Zammas while working at Executive Securities in the year 1971. His first contact with the defendant, Rodman, was in the Spring of 1972.

During the Spring of 1972, Perlmutter had a conversation with Zammas concerning the stock of Power Conversion, Inc. According to Perlmutter, Zammas said, "We have a very good situation here in Power Conversion and do you think Eric Aiken would do a write up?" Perlmutter told Zammas that because of the background surrounding the Aiken-Zammas relationship, he doubted Eric "Would touch it at all..." Zammas indicated that it would be worth his while. Perlmutter agreed to mention this to Aiken.

According to Perlmutter, Aiken's immediate reaction was, "I don't want to have anything to do with it." "I don't want to have anything to do with Tom Zammas again." This initial reaction of Aiken was based upon a problem they (Aiken and Zammas) had in the past. During August of 1972 favorable articles concerning Power Conversion appeared in several publications. Perlmutter then had a second conversation with Aiken wherein he asked Aiken

to reconsider his position. Perlmutter pointed out to Aiken that they could earn some money if an article was written. Aiken agreed to look into the stock. According to Perlmutter, someone at Value Line already had a file on the Power Conversion stock issue.

Aiken called a day or so after the second conversation and asked for a meeting with Zammas. A meeting was held in late August or early September in an Italian restaurant on the East side of Manhattan.

After a discussion about some prior dealings where Aiken did not get paid, Zammas indicated he would guarantee payment in this situation. As part of the guarantee, 1,000 shares of Power Conversion stock would be given to Aiken as collateral. Fifteen thousand dollars in cash was to be paid upon the writing of the article. There was also to be "some type of play on the profits on the 1,000 shares of collateral stock".

Aiken agreed to proceed when he had possession of the shares of stock. It was at this time that Perlmutter left the restaurant. Perlmutter testified that he later received from Aiken, $3,500.00 in cash and a forgiveness of a $4,000.00 debt. This was paid about one week after the article was published.

On cross-examination, Perlmutter was asked about several dealings he had on stocks other than those mentioned in his agreement with the Government. Perlmutter, in most instances, invoked his Fifth Amendment privilege and declined to answer questions.

When questioned about the initial meeting with Zammas, Perlmutter recalled that it occurred in April, May or early June of 1972. After Aiken's original rejection of the article, Perlmutter approached him again, in August of 1972. Zammas did

not solicit this second effort of Perlmutter. Perlmutter then approached Zammas, after the second meeting with Aiken, and, at that time, indicated Aiken's willingness to do the article.

Perlmutter admitted that Aiken told him he, "Could never guarantee any article would be published". Everything had to meet with the approval of his boss.

William Aiken was the executive editor of Value Line Selection and Opinion, a publication of Arnold Bernhard and Co., Inc. in the year 1972. Prior to his testifying, Aiken had pled guilty to one count of fraud in connection with the case against the defendant, Zammas, and, had fusther entered into an agreement with the Government concerning his other criminal involvements. This agreement was entered into evidence and read into the record.

Aiken then testified that he knew and had engaged in business dealings with Stanley Perlmutter. In September of 1972 Perlmutter came to him with a proposition regarding a company called Power Conversion. Perlmutter told him that Zammas wanted a write up on Power Conversion. Aiken refused the deal at that time.

This refusal was predicated upon a prior involvement with the defendant, Zammas, in a transaction concerning the stock of Casa Bella Imports, Inc. Counsel for Zammas objected to the introduction of testimony relating to Casa Bella. Further, he moved that the answer of the witness concerning Casa Bella be stricken from the record. It was defense counsel's position that the Casa Bella situation was not a prior similar act. The Government argued that it was. The Court allowed the testimony to be admitted as a prior similar act.

Aiken testified that he finally agreed to go to a meeting with the defendant. He then described the Casa Bella situation which had occurred in 1970.

Aiken met with Zammas and Perlmutter in September, 1972 at the La Fortuna Restaurant. At that meeting, Zammas offered him Fifteen Thousand Dollars in cash and an override on 20,000 shares of Power Conversion stock. According to the witness, he requested guarantees and was told he would be given 1,000 shares of the stock of the company to hold as security for the payment.

The transfer of shares and payment of $1,000.00 was to take place that evening. Accordingly, Aiken accompanied Zammas to an apartment on 35th and Lexington Avenue where the transfers took place.

Aiken prepared an article on Power Conversion and submitted it for publication. One day prior to the official publication, Aiken advised Zammas that the article was coming out and arranged a meeting for that night. At approximately 11:30 p.m. the witness, his fiance, the defendant and his girlfriend met at the Ground Floor Cafe, where the witness testified monies and copies of the article were exchanged in the men's room. Over objection, Aiken was allowed to testify that the article written by him was favorable.

Aiken recalled another meeting with the defendant, Zammas, several months after the article. According to Aiken, the defendant stated at that meeting that, "Well, I got wiped out, I had a lot of puts I had to walk away from. The S.E.C. is after me, but you don't have to worry because I can't do anything, you know, - I can't do anything to you without bearing to myself."

On cross-examination, Aiken testified to his agreement with the Government. He admitted lying to the Government when he

first agreed to testify in 1973. He further admitted committing perjury before the S.E.C. in a Philadelphia hearing.

Aiken admitted that he never received money from the defendant, Zammas on the Casa Bella deal. Aiken recalled the first meeting with Stanley PDrlmutter concerning Power Conversion taking place in September, 1972.

In response to questioning, Aiken admitted that he could not guarantee the publishing of an aritcle in Value Line. Further, he could not guarantee publication of an article to the defendant on the night of their first meeting. Aiken could never guarantee the publication of an article since Arnold Bernhard himself had the final authority as to all articles published. Bernhard was the publisher of Selection and Opinion.

In conclusion, Aiken admitted that the defendant, Zammas, had no idea an article was being published until after the actual publication of the magazine.

Pericles Constantino had formerly been President of Provident Securities, a brokerage house, before being barred from the Securities Industry for violations of Federal Securities laws. Constantino was able to identify the defendant, Rodman, as a market maker in Power Conversion. Rodman and he had a meeting during the summer of 1972 relating to a stock known as Fantastic Fudge. During this meeting, Constantino asked the defendant Rodman, how he had managed to keep the selling price of Power Conversion stable. Rodman informed Constantino that it had cost him to have an article published in Value Line.

On cross-examination, Constantino recalled the conversation taking place a month or two prior to the publication of the

article itself.

Constantino admitted perjuring himself in an S.E.C. investigation that related to Fantastic Fudge. Constantino was testifying in order to comply with an agreement wherein he promised to cooperate with the Government. Constantino did not know the defendant, Zammas.

Susan Aiken, the wife of Eric Aiken, recalled the September meeting. She and Mr. Aiken went to the Ground Floor restaurant to meet Zammas. Her husband had informed her that he was there to pick up a sum of money. The defendant, Zammas, and Stephanie Palumbo arrived after the Aikens. Mr. Aiken gave Zammas an envelope with Power Conversion articles contained therein. When the Aikens departed the restaurant, Eric Aiken had Fourteen Thousand Dollars in cash in his coat pocket. During cross-examination Mrs. Aiken admitted signing a false affidavit.

Robert Wymbs met the defendant, Zammas in the office of Henry Goldfarb. Wymbs was introduced to Rodman by Zammas in the offices of C.I. Oren. Wymbs visited the office of C.I. Oren almost daily during the period of August and September, 1972.

It was during this period that Wymbs bought and sold the stock of Power Conversion, Inc. Wymbs was informed by Zammas that Power was an expanding and growing company which would be a good investment. Rodman also indicated to Wymbs that the stock in Power was on its way up.

Early in September of 1972, Wymbs overheard a phone conversation wherein the defendant, Rodman was asking an unidentified person as to when the article would be finished for publication. Thomas Zammas and Irving Orenstein were present while Rodman was on the telephone.

Another conversation took place approximately one week later in an aprtment in Manhattan. Present were Rodman and his girlfriend, Denise Gennaro. A third conversation occurred several days later between Rodman, Zammas and Denise Gennaro. It was during this third conversation that Rodman produced an envelope with approximately Five Thousand dollars in cash. Wymbs stated that this money was produced after it was ascertained that the article in question was ready to be published. The money was to be given to someone at Value Line to publish the article.

On cross-examination, Wymbs testified that he first heard about an article coming out in Value Line in late August, 1972. Wymbs was aware of a Five Thousand Dollars payoff to someone at Value Line to get the article lpublished.

Irving Orenstein, President of C.I. Orin and Co., was introduced to the public offering of Power Conversion by Thomas Zammas. Orenstein's company took in 20,000 shares of Power Conversion and distributed same to its customers. Some of these shares were brought back by C.I. Orin at the direction of Thomas Zammas. Orenstein was told there was going to be a write-up in Value Line by either Zammas or Rodman. He wasn't sure which of the defendants informed him of the article.

Alan Umbogy met with Rodman and Zammas on September 27, 1972 at Wolf's Coffee Shop. It was at this time that Rodman showed Umbogy a copy of the article in Value Line that Zammas had allegedly just finished arranging for. According to Umbogy, the article was to hit the street that day.

Umbogy took a copy of the article he was given to his home. This was subsequently delivered to the U.S. Attorney's Office and was entered into evidence.

During the third week of September, 1972, Rodman asked Umbogy, during a telephone conversation, to purchase some shares of Power because an article was scheduled to be published in Value Line. This phone conversation took place on the day prior to Umbogy being given the article he previously testified to.

After being shown a copy of the Value Line article, Umbogy could no longer be sure that his meeting with Rodman and Zammas took place on the 27th. The copy of the article given to Umbogy was a xerox copy of the article that was to hit the street on the day of the meeting. None of the partie s were making a secret about the article coming out. Umbogy was never told that the article had been paid for.

Leonard Flocco of the National City Bank testified that on or about September 18, 1972, Thomas Zammas had a conversation with him at the bank. The conversation related to a secured loan. It was during this conversation related to a secured loan that Mr. Zammas apparently indicated an article would be written concerning the Power Conversion stock. The memoranda prepared by Flocco were introduced into evidence.

Stephanie Palumbo was with the defendant, Zammas, when he met with Eric Aiken and his fiance. The meeting took place at the Ground Floor restaurant. At dinner the two men left the table and were apparently gone for some period of time. Miss Palumbo had no idea why she had gone to the meeting at the restaurant.

At the conclusion of Miss Palumbo's testimony, the Government rested its case. Defense counsel moved for a directed verdict of acquittal at the close of the case. This motion was denied by the Trial Court.

Edward J. Crooker, was employed by Value Line Selection and Opinion as the Comptroller in September of 1972. Exhibit L was the list of officers and directors of Arnold Bernhard & Co., Inc. during 1972. Crooker identified the defendant's Exhibit I as an issue of Selection and Opinion dated October 16, 1970. On the back of this issue was a good faith disclaimer. This was the same good faith disclaimer that Value Line consistantly published throughout 1972.

Crooker testified that if Aiken had reported the beneficial interest in the stock of Power Conversion to Arnold Bernhard & Co.'s legal counsel, pursuant to the good faith disclaimer, it would not have been disclosed to the public.

At the conclusion of this witness' testimony, the defense rested. A motion for judgment of acquittal was tendered to the Trial Court. After a lengthy argument, the Court denied the motion.

During closing argument defense counsel argued that the payment in question was not a violation of Federal law if disclosure had been made. The payment itself, according to defense counsel, was perfectly legal under Federal law provided there was disclosure. The U.S. Attorney objected to this legal argument. It was at this point that the Court, in the presence of the Jury, stated as follows:

> "Yes, we wnet over that earlier and it was determined that under State law, if the jury finds it to be true, it is not a legal act. The question is whether or not you are implying to the Jury that giving a payment under the circumstances here is legal.
>
> You said it was legal and we determined it was illegal under State law to give such a payment. The Federal law makes it illegal to give such a payment if it is not disclosed. So don't mislead the Jury by telling them it is a legal act if they find it did occur."

This comment by the Court led to a Motion for mistrial.

The motion was made after defense counsel concluded his closing argument. The Court denied said motion.

The U.S. Attorney in his final remarks to the Jury indicated that the defendant, Zammas had done business with Aiken on other occasions. Mr. Lowe stated that the Casa Bella article, which had been brought up during the testimony, did not contain a disclosure. Defense counsel objected to this line of argument since the Casa Bella article had not been put into evidence. Defense counsel further pointed out that there was no evidence before the Jury which would indicate that disclosure had not been made. A motion to strike was tendered in behalf of the defendant. The Court denied the defendant's motions. Further, the Court indicated that the Jury could find from the evidence that there had been no disclosure in the Casa Bella article.

After all counsel had completed their closing arguments, another motion for mistrial was advanced to the Trial Court. Apparently Mr. Rodman's attorney, Mr. Berger, had information that Denise Gennaro had told the U.S. Attorney that Mr. Wymb's testimony concerning her presence at a meeting was untrue. Miss Gennaro had told Mr. Lowe that she was not in the apartment in question during July, August or September of 1972. Mr. Berger indicated that Gennaro had advised him of this fact. The U.S. Attorney's office indicated that Mr. Berger's statements were essentially correct. The Government's position was, that since Mr. Berger was aware of Gennaro's testimony, the Government had no obligation to disclose same. The Assistant US Attorney had assumed that Mr. Berger would relate this information to Mr. Zammas' counsel. Berger admitted that he had not disclosed this information to any of Zammas' attorneys. The Court withheld

ruling on the Brady question and adjourned the case until the following morning.

The following morning the Court instructed the Jury as to the applicable law. Over objection, the Trial Court indicated that it would instruct the Jury that the "Casa Bella" testimony could be considered as a prior similar act. This instruction was given by the Trial Court. Further, instructions relating to the substantive crime were objected to by the defendant.

After the jury retired, the Court heard argument concerning the claimed Brady objection. It was during this argument that counsel for the defendant, Rodman, admitted that he never informed counsel for defendant Zammas of his knowledge concerning Ms. Gennaro's testimony. The Court heard lengthy argument wherein the Government conceded the fact that it had an agreement to supply Brady material to the defense. After extensive argument, the Courtruled that the Government had no obligation to supply Brady material relating to Denise Gennaro.

A motion for mistrial relating to the Casa Bella argument was denied by the Trial Court.

After a lengthy deliberation, the Jury found the defendant guilty on all counts of the indictment.

REASONS FOR GRANTING REHEARING

1. This Court failed to recognize that the trial court erred in making prejudicial comments during closing which effectively denied Zammas a fair trial. The Trial Court made comments twice during closing which indicated her belief in the

Defendant's guilty. (TR 1117 and 1120-1121). These statements were prejudicial per se.

A conviction based upon such prejudicial comments is anathema.

United States v. Nazzaro
472 F. 2d. 302 (2nd Cir. 1973)

United States v. Gugielmini
384 F. 2d. 602 (2nd Cir. 1967)

United States v. Quercia
289 U.S. 466, 53 S. Ct. 698,
77 L. Ed. 1321 (1933)

See pages 16-23 of Appellant's main brief.

2. The trial court failed to properly instruct the jury as to the elements of the offenses charged, violating Defendant's due process rights by virtually directing a verdict against Defendant.

It is well settled that a jury instruction should never be tanatamount to directing a verdict of guilty. The trial judge in instructing on the elements of the anti-touting statute gave an instruction which made mere evidence of a point sufficient to satisfy an entire element. Clearly this directive vitiated any instructions on the nature of evidence or reasonable doubt, and denied Defendant his due process rights.

Further, despite agreeing to give a vital instruction the court failed to give same. The failure to instruct affected credibility of the defense and denied Defendant his due process rights.

United States v. Dardi
330 F. 2d. 316 (2nd Cir. 1964)

United States v. Murdock
290 U.S. 389, 54 S. Ct. 223 (1933)

See pages 24-30 of Appellant's brief.

3. The trial court denied Defendant's due process rights by its failure to direct a verdict of acquittal at the end of all the evidence. This was and is a case of first impression in this circuit. As indicated in argument before this court, only one prior case concerning a violation of 15 U.S.C. 77 q (b) has ever been reported.

The government never having proved beyond a reasonable doubt that the payment was non-disclosed provided a void in the chain of proof which should have been fatal to the government's case.

If the payment was proper under 77 q (b), as argued then a legal act could not have constituted a scheme and artifact to defraud, vitiating the charges under 18 U.S.C. 1341.

Failure to grant a directed verdict was not proper.

United States v. Glasser
443 F. 2d. 994 (2nd Cir. 1971)

See Appellant's brief pages 39-46.

MOTION IN THE ALTERNATIVE FOR A STAY OF MANDATE AND FIXATION OF BAIL PENDING CERTIORARI

Even if this Court should deny rehearing, and rehearing en banc; or if on rehearing it adheres to its original decision, then it is submitted that the points set forth above are now before the Supreme Court and present important issues that ought to be reviewed. The mandate therefore should be stayed.

In addition, since the guilt was proved so "thinly", coupled with the denials of due process, coupled with important issues presented, it is submitted that the Appellant should be

admitted to bail in a reasonable amount pending certiorari. The issues are clearly not frivolous or meritless.

A stay of mandate and bail therefore, at least, should be granted.

RESPECTFULLY SUBMITTED,

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By _____
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Attorney for Appellant, Zammas

CERTIFICATION OF GOOD FAITH

I, **DAN BRECHER,** a member of the Bar of this Court, certify that this Petition for Rehearing and Motion in the Alternative for Stay of Mandate and Bail Pending Certiorari, is submitted in good faith and not for the purpose of delay.

January 18, 1976

_____
DAN BRECHER, ESQUIRE

A 202 Affidavit of Personal Service of Papers

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, **Appellee,** - *against* - **THOMAS ZAMMAS,** **Defendant-Appellant**	*Index No.* *Affidavit of Personal Service*

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York

That on the 23 *day of* Jan *19* 76 *at* 1 St. Andrews Plaza, N.Y , N.Y.

deponent served the annexed Petition for Rehearing *upon*

Thomas Cahill, US Attorney

the Attorney *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.*

Sworn to before me, this 23
day of January *19* 76

Robert T. Brin

Victor Ortega

VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977